No. 89-220

FILED
OCT 10 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

JAMES E. SECRIST,
Appellant,
v.
UNITED STATES SENATOR TOM HARKIN,
PAM MCKINNEY, JOHN FREW, AND CITIZENS FOR HARKIN,
Appellees.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF FOR RESPONDENTS IN OPPOSITION

MICHAEL J. MADIGAN
W. RANDOLPH TESLIK *
JOHN M. COOK
AKIN, GUMP, STRAUSS, HAUER & FELD
Suite 400
1333 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 887-4000
Attorneys for United States Senator Tom Harkin, Pam McKinney and John Frew

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether the court of appeals departed from generally applicable standards in holding that the statements in dispute were constitutionally protected opinion where the statements in dispute addressed issues raised in a heated 1984 campaign for the United States Senate, used colorful and hyperbolic language, addressed the unverifiable motives of public officials, and contained numerous indicators of opinion.

PARTIES

James E. Secrist

Tom Harkin

Pam McKinney

John Frew

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	1
STATEMENT	2
REASONS WHY THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED	12
I. Holding of the Court of Appeals	12
II. Dictum of the Court of Appeals	14
CONCLUSION	16

TABLE OF AUTHORITIES

CASES: Page

Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967) 15
Deupree v. Iliff, 860 F.2d 300 (8th Cir. 1988) 8, 9, 10
Garrison v. Louisiana, 379 U.S. 64 (1964) 11
Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) 8
Greenbelt Cooperative Publishing Ass'n v. Bresler, 398 U.S. 6 (1970) 8
Harte-Hanks Communications, Inc. v. Connaughton, 109 S. Ct. 2678 (1989) 11, 15
Information Control Corp. v. Genesis One Computer Corp., 611 F.2d 781 (9th Cir. 1980) 10
Janklow v. Newsweek, Inc., 788 F.2d 1300 (8th Cir.) (en banc), *cert. denied*, 479 U.S. 883 (1986) 8
Liberty Lobby, Inc. v. Dow Jones & Co., 838 F.2d 1287 (D.C. Cir.), *cert. denied*, 109 S. Ct. 75 (1988) 11
New York Times Co. v. Sullivan, 376 U.S. 254 (1964) 13
Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin, 418 U.S. 264 (1974) 8
Ollman v. Evans, 750 F.2d 970 (D.C. Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1127 (1985) 8, 10
Speer v. Ottaway Newspapers, Inc., 828 F.2d 475 (8th Cir. 1987), *cert. denied*, 108 S. Ct. 1247 (1988) 11
St. Amant v. Thompson, 390 U.S. 727 (1968) 11, 15

STATUTES:

28 U.S.C. § 1254(1) 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-220

JAMES E. SECRIST,

Appellant,

v.

UNITED STATES SENATOR TOM HARKIN, PAM MCKINNEY, JOHN FREW, AND CITIZENS FOR HARKIN,

Appellees.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B) is reported at 874 F.2d 1244. The opinion of the district court (Pet. App. A) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 9, 1989. The petition for a writ of certiorari was filed on August 7, 1989 and amended on August 25, 1989.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. *Background and Summary.* At the time the statements in dispute in this case were made, former Marine Lieutenant Colonel James E. Secrist, plaintiff and petitioner here, had been assigned by former Secretary of the Navy Lehman to serve on the personal Congressional staff of former United States Senator Roger W. Jepsen, during Senator Jepsen's 1983-84 campaign for the United States Senate seat from Iowa. Throughout this assignment, Col. Secrist was on official Marine Corps duty with his salary paid by the Marine Corps. (Pet. App. at 1b-2b). Senator Jepsen, who was chairman of a United States Senate Armed Services subcommittee, had arranged the assignment personally, and Col. Secrist, who had been a Congressional liaison, or lobbyist, for the Pentagon to that time, had accepted the assignment to serve on Senator Jepsen's personal staff in lieu of a scheduled tour of duty in Okinawa, Japan. (*Id.*).

The assignment created controversy within the military and in the press. Col. Secrist's stated duties included helping Iowa businesses obtain military procurement contracts, in the course of which he made numerous trips to Iowa during the campaign. It is undisputed that, after Col. Secrist joined Senator Jepsen's staff, campaign contributions from defense industry political action committees, or PAC's, to Senator Jepsen increased. It is also undisputed that a number of Col. Secrist's trips to Iowa during the campaign were paid for from Senator Jepsen's campaign funds.

Respondent Tom Harkin was at that time a United States Congressman from Iowa and a candidate for the Senate seat occupied by Senator Jepsen. (Pet. App. at 4b). The disputed statements were made in a campaign

press release issued by Citizens for Harkin,[1] respondent Harkin's campaign committee, late in the campaign, after learning that Col. Secrist's travels in Iowa were compensated from campaign funds and that defense industry contributions to Senator Jepsen's campaign increased after Col. Secrist's assignment. Representative Harkin issued a satiric and ironic press release entitled "The Jepsen Colonel Caper," (Pet. App. 19b), which said that Secrist, who had not succeeded in getting defense contracts for Iowa businesses, "has been more successful at raising money for Sen. Roger Jepsen's reelection bid," and that Col. Secrist "appears [to be] . . . successful at opening doors to defense campaign money coffers on behalf of [Sen. Jepsen]." (Pet. App. at 19b, 20b). Respondent Pam McKinney drafted the release, and respondents Harkin and John Frew approved the release for distribution. (Pet. App. at 5b).

Respondent Harkin defeated Senator Jepsen in the election and now serves as United States Senator from Iowa. (Pet. App. at 5b). After the press release was issued and shortly after he was eligible to do so with full military retirement pay, Col. Secrist became a paid lobbyist for Rockwell International Corporation, a defense contractor. (Pet. App. at 5b). In the first three years after his retirement from the military, Col. Secrist's annual income increased from approximately $45,000 to approximately $96,000. (Pet. App. 1b; SF [2] at ¶ 75).

2. Through the press release, Senator Harkin entered on ongoing public debate concerning the propriety of Col.

---

[1] Citizens for Harkin was never properly served and is not a party to this lawsuit.

[2] The district court stated that "the essentially undisputed factual background and status of the parties is well documented in the defendants' statement of facts (filed June 3, 1988) at pages 3 through 22." (Pet. App. at 2a). The statement of facts cited will be referenced "SF" in this brief and will be cited by page and/or paragraph number.

Secrist's activities during the assignment. (Pet. App. 4b). By the assignment, Senator Jepsen had obtained a "Special Assistant" who was concurrently an active-duty lieutenant colonel in the United States Marine Corps being paid by the Marine Corps and whose primary task during the campaign was to obtain defense procurement contracts for businesses located in Iowa, i.e., for Senator Jepsen's constituents. (Pet. App. 1b-4b, 13b; SF at 12-15).

3. The impact on the campaign of placing a Marine Corps officer being paid by the Defense Department on the personal staff of a Senator running for re-election was predicted, and Senator Jepsen and Col. Secrist were widely criticized within the military and in the press for the assignment. (Pet. App. at 3b; SF at 9-10). An August, 1983 article in *Congressional Quarterly* analyzed the legal ramifications of the assignment and concluded that it was made "[i]n apparent disregard of Defense Department regulations." (SF at ¶ 28 (citing exh. 18)). This had also been the conclusion of an internal legal memorandum prepared by the Marine Corps.[3]

An August 12, 1983 editorial in the *Des Moines Register* describing the assignment as "a unique and highly questionable first" commented:

> Even if the arrangement is legal, though, it is without justification. Jepsen says that Secrist, whom he met when the Colonel was serving as a Pentagon lobbyist in the Senate, will be useful in obtaining military contracts for Iowa businesses.

(SF at ¶ 31). Moreover, the editorial questioned whether Col. Secrist would be useful in such a role:

---

[3] Questions about the propriety of the assignment were raised within the military before the assignment was made. A memorandum of law reviewed by Marine Corps Commandant. P.X. Kelley recommended strongly that Col. Secrist not be assigned to Senator Jepsen's staff. (Pet. App. at 2b; SF at ¶ 27).

> A Marine lieutenant colonel has *that* kind of influence? But, in his snappy uniform, he ought to improve the scenery around Jepsen at election-year hearings and other gatherings in Iowa. (We hope that he won't feel required to open car doors for the senator.)

(Pet. App. at 3b). The editorial concluded that Senator Jepsen had in fact merely " 'found a novel way to get high-priced staff help' at no cost to his Senate staff budget." (*Id.*).

An August 16, 1983 editorial in the *Washington Post* entitled "No, Senator Jepsen," criticized the Navy and Senator Jepsen for assigning Col. Secrist to do casework on behalf of Iowa constituents because of its "substantial" political impact. (SF at ¶ 32). An August 14, 1983 editorial in the *Chicago Tribune* entitled "Sen. Jepsen is one smart cookie" said:

> A good Marine would have—should have—told Sen. Jepsen to go fly a kite.

The next day another editorial in the *Chicago Tribune* entitled "Jepsen's Private Colonel" stated:

> The colonel may appreciate the duty station; the weather in Washington is not as good as Japan's. But his duty as an officer is to provide this country with the strongest possible defense. Since the Congress is chiefly responsible for . . . wasteful practices . . ., the colonel seems to be serving on the wrong side.

(SF at ¶ 28 (citing exh. 24)).

4. As predicted, and as admitted by Col. Secrist, many of his activities on behalf of Senator Jepsen during the campaign did have a beneficial impact on Senator Jepsen's campaign. (SF at 12-20 & ¶ 64; Pet. App. at 4b). During the campaign, Col. Secrist traveled to Iowa numerous times on behalf of Senator Jepsen, (Pet. App. at 4b), and contacted hundreds of Iowa citizens and busi-

nesses. (SF at ¶ 37-44). Senator Jepsen's campaign committee reimbursed Col. Secrist for at least two of those trips because the military could not reimburse him. (Pet. App. at 4b-5b; SF at ¶ 43).

5. Late in the campaign, respondents Harkin, McKinney, and Frew learned several facts fulfilling the predictions of abuse. As the court of appeals found:

> (1) while in a Des Moines restaurant, Teresa O'Brien, a Harkin staff member, had overheard two individuals whom she believed to be Secrist and a Jepsen staff member discussing something they were going to do for Jepsen's campaign in Iowa; (2) Jepsen's campaign committee had twice reimbursed Secrist for travel expenses; (3) Department of Defense expenditures in Iowa had decreased since Secrist joined Jepsen's staff; and (4) Jepsen had reported an increase in contributions from defense-contractor political action committees since Secrist's appointment.

(Pet. App. at 15b). In the press release, which was entitled "The Jepsen Colonel Caper" and was reprinted as an appendix by the court of appeals, (Pet. App. at 19b-20b), respondents satirically and ironically reported the new evidence substantiating the foreseeable and foreseen consequences of Col. Secrist's arrangement and reported the two comments by Senator Harkin that Col. Secrist finds objectionable:

> A pentagon Marine Colonel assigned to drum up defense contracts for Iowa businesses has been more successful at raising money for Sen. Roger Jepsen's reelection bid, according to U.S. Rep. Tom Harkin, a candidate for the U.S. Senate.
>
> * * * *
>
> "While the Lt. Col. may not be opening the Senator's car doors," Harkin said: "It appears that he is successful at opening doors to defense campaign money coffers on behalf of the Senator."

(Pet. App. at 4, 5b-6b).

6. *Proceedings Below.* Petitioner Col. Secrist filed this libel action pro se[4] in the United States District Court for the Southern District of Iowa on October 10, 1986, two years after the press release was issued and after he had retired from the military to become a lobbyist for a defense contractor. After thorough discovery by all parties, respondents moved for summary judgment, and, on August 2, 1988, the district court granted respondents' motion on two first amendment grounds without reaching other issues raised by respondents.

Specifically, the court ruled that Col. Secrist, a public official and a public figure, had failed to produce clear and convincing evidence of actual malice:

> There is no showing that any defendant "entertained serious doubts as to the truth" of the press release, . . . nor that any defendant has a "high degree of awareness" that the press release was probably false . . . . It is doubtful that plaintiff had even made a showing of negligence or gross negligence, but such a showing would not elevate the claim to constitutional magnitude.

(Pet. App. at 3a). The district court also ruled that

> the disputed text of the press release constituted opinion . . . . Opinion is the trademark of political rhetoric, even when set forth in narrative terms. Clearly the press release was a message entirely political in context and in wording.

(Pet. App. at 4a).

7. In a lengthy analysis of the law and facts, an Eighth Circuit panel unanimously affirmed on the ground that the statements at issue were opinion absolutely protected by the first amendment because of their context and wording:

---

[4] Petitioner retained counsel shortly after the suit was filed and has been represented since that time.

> We conclude that under all of the circumstances surrounding publication of the press release, the challenged statements could only be interpreted by readers of the release as Harkin's opinion on the effect of Secrist's appointment to Jepsen's staff. Accordingly, we find the district court correctly granted summary judgment against Secrist because the statements of which he complains are absolutely protected by the First Amendment.

(Pet. App. at 14b).

8. In reaching its holding, the court of appeals applied the principle in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974), that expressions of opinion are absolutely protected by the first amendment to the United States Constitution. (Pet. App. at 8b). The court analyzed the statements at issue according to the factors that it had employed in *Janklow v. Newsweek, Inc.*, 788 F.2d 1300 (8th Cir.) (en banc), *cert. denied*, 479 U.S. 883 (1986), and in *Deupree v. Iliff*, 860 F.2d 300 (8th Cir. 1988), and that the District of Columbia Circuit had used in *Ollman v. Evans*, 750 F.2d 870 (D.C. Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1127 (1985).

9. The court of appeals rejected petitioner Secrist's claim that the statements concerning "successful fundraising" and "opening doors to defense money coffers" constituted accusations that Secrist had directly asked people for campaign contributions in violation of the Hatch Act (Pet. App. at 12b):

> the challenged statements concerning fundraising are not so precise, specific, or verifiable that they can be equated—as Secrist alleges—as akin to an accusation of criminal conduct. *Cf. Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 284-85 (1974) (epithet "traitor" was opinion, not imputation of actual criminal conduct in context of labor dispute); *Greenbelt Cooperative Publishing Ass'n v. Bresler*, 398 U.S. 6, 13-14 (1970) ("blackmail" charge represented opin-

ion of developer's tactics, not accusation of crime). *See also Deupree*, 860 F.2d at 303.

(Pet. App. at 13b).[5] Quoting undisputed record testimony the court found that there are numerous ways Mr. Secrist may have raised money for the incumbent Senator Jepsen:

> One of the ways is to go out and actually solicit contributions, ask people for money.
>
> Another way is simply through what can be referred to as goodwill fund raising, or fund raising that occurs because an employee or someone who is working on your behalf goes out and does a job for someone that results in a campaign contribution.
>
> By his very presence on Senator Jepsen's staff, Jim Secrist sent a signal to the defense community, by the fact that the Secretary of the Navy was willing to do something very unusual, something that the Pentagon said was extremely unusual, that being detail a Marine Lieutenant Colonel to the personal staff of a United States Senator to supplement that staff, to act as a liaison between the Senator's office, defense contract[ors], and businesses in Iowa.
>
> That sends a signal that this particular Senator is a friend and is someone to support.
>
> And to the extent that any of that message resulted in campaign contributions from defense contractors, then Mr. Secrist raised money.
>
> To the extent that any small business person in the state of Iowa that Colonel Secrist worked with and helped out was pleased enough to support Senator Jepsen's campaign for a campaign contribution or to support the campaign in another way that led

[5] This false allegation concerning the meaning of the press release is the keystone of petitioner Secrist's entire actual malice argument. (Pet. at 10, ¶ 1). Because, as the court of appeals demonstrated, this allegation is incorrect, Col. Secrist's actual malice argument collapses. (Pet. at 10-12).

> to a campaign contribution, Colonel Secrist raised money.
>
> To the extent that Colonel Secrist was traveling in Iowa, meeting with small business people, acting as the Senator's emissary, if you will, assisting small businesses and enhancing Senator Jepsen's reputation with these small business people, and that resulted in campaign contributions, then Colonel Secrist was raising money.

(Pet. App. at 12b-13b). The court noted that Col. Secrist admitted being "very active on behalf of Iowa for almost two years" and assisting "hundreds of Iowa business firms in their efforts to sell to the government." (Pet. App. at 13b). The court also had pointed out that Senator Jepsen had been forced to concede publicly that his campaign funds had paid for Col. Secrist's trips to Iowa. (Pet. App. at 5b).

10. The court's holding also analyzed the public context in which the press release was issued, (Pet. App. at 8b-10b), which was a political campaign, (Pet. App. at 10b), and the literary context of the press release, (Pet. App. at 10b):

> Context is crucial and can turn what, out of context, appears to be a statement of fact into "rhetorical hyperbole," which is not actionable. *Ollman*, 750 F.2d at 1000 (J. Bork, concurring). *See Deupree*, 860 F.2d at 303; *Information Control Corp. v. Genesis One Computer Corp.*, 611 F.2d 781, 784 (9th Cir. 1980).

(Pet. App. 8b).[6]

---

[6] The first page of the press release that was reviewed by the court of appeals clearly proclaimed that the press release was issued and paid for by petitioner Harkin's campaign. (Respondents' Appendix).

The court also concluded the language of the release "signals that readers should expect Harkin's opinion." (Pet. App. 11b).

11. In dictum (Pet. App. at 14b-17b), the court of appeals also determined Col. Secrist had not produced clear and convincing evidence that respondents had—

> "in fact entertained serious doubts as to the truth of [their] publication," *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968), which amounted to a "high degree of awareness of . . . probable falsity." *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964). *See Liberty Lob y, Inc. v. Dow Jones & Co.*, 838 F.2d at 1292-93; *Speer*, 828 F.2d at 478.

(Pet. App. at 15b). In contrast to examples of bad faith, which could indicate reckless disregard, in *St. Amant*, 390 U.S. at 732-33, and, more recently in *Harte-Hanks Communications, Inc. v. Connaughton*, 109 S.Ct. 2678 (1989), the opinions in the press release were based upon—

> public reports filed by Jepsen's campaign committee and issued by the Department of Defense as well as the observation of a staff member whose credibility has not been questioned.

(Pet. App. at 17b). In fact, there was nothing in the record "suggesting with convincing clarity that . . . [respondents] acted in bad faith." (*Id.*).

Based upon its analysis of "all of the circumstances surrounding publication of the release," the court of appeals concluded that the challenged statements would be interpreted by reasonable readers of the press release "as Harkin's opinion on the effect of Secrist's appointment to Jepsen's staff." (*Id.* at 14b). Accordingly, holding that the statements are absolutely protected by the first amendment, the court of appeals affirmed the district court's grant of summary judgment to respondents. (*Id.*).

REASONS WHY THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED

The decision below applies first amendment principles that are not challenged by petitioner Secrist, who only challenges the application by the court of appeals of legal standards, which standards petitioner himself employs in his petition, to facts unique to this case and unlikely to be repeated in future cases. The decision of the court of appeals affirming the district court's summary judgment is correct and does not conflict with any decision of this Court or of any other court of appeals. Accordingly, further review by this Court is not warranted.

I. Holding of the Court of Appeals

a. Petitioner does not challenge the law or the facts upon which the court of appeals based its holding that the disputed statements are constitutionally protected opinion. Instead, he simply invites this Court to enter into "[a]n examination of the facts" to establish the claimed error of the court of appeals. (Pet. at 16). The analysis of these unusual facts under a well-articulated and unchallenged legal standard does not present any ground for review by this Court. Toward the end of the petition, petitioner does suggest that the court of appeals applied a different legal standard because a political campaign was involved. (Pet. at 20). His guarded assertion is completely unfounded.

Contrary to petitioner's assertion, the court of appeals' decision constitutes a careful, painstaking analysis consistent with the standard previously employed in the Eighth Circuit and other courts in libel actions in a variety of factual settings. Indeed, in attacking the court of appeals' decision, petitioner employs in his own analysis of the facts the same four-part test applied by the court of appeals. (Pet. at 16-17). Petitioner's allegation that a different standard was used is incorrect.

b. Moreover, the court of appeals was clearly correct in holding that the statements complained of were constitutionally protected opinion. The court based its holding upon an aggregate of factors, (Pet. App. at 14b), not just one factor as petitioner suggests. The court's including the political context as one part of the overall analysis is entirely consistent with our "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). The court of appeals correctly found that, from the writing style of the release, (Pet. App. at 11b), the heated political context and political nature of the publication, (Pet. App. at 8b-10b), and the extensively analyzed imprecision and unverifiability of the language used, (Pet. App. at 11b-14b),[7] it was clear the press release conveyed the opinions of its writers and would be so understood by its audience. (Pet. App. at 14b).

---

[7] One aspect of this finding deserves emphasis. It was the gist of Col. Secrist's complaint that the press release should be interpreted to have asserted unambiguously that Secrist personally solicited campaign contributions for Senator Jepsen. (*e.g.*, Pet-App. at 12b.) The court of appeals refused to accept this argument, holding that the language used in the press release—that Secrist was "raising money" and "opening doors to defense campaign money offers" for Senator Jepsen—did not necessarily mean that Secrist personally solicited funds. The court held that these phrases could just as easily have referred to just what appears to have happened—that Secrist's actions (paid for partly by Jepsen's campaign and partly by the Marine Corps) generated "good will" in the defense community that resulted in increased contributions. (Pet. App. at 12b-13b).

The inescapable conclusion from this reasoning is that even if these statements are to be taken as fact and not opinion, Secrist also failed to prove that they were false. This failure of proof provides an independent ground for refusing to disturb the judgment of the court of appeals.

II. Dictum of the Court of Appeals

The main thrust of petitioner's complaint—that the court of appeals misapplied the actual malice standard—addresses what is merely dictum in the court of appeals' opinion and thus provides no reason for review by this Court. Moreover, even if, as petitioner has requested, this Court reviewed the court of appeals' application of established law to the facts of this case, there would be no reason to disagree with the court of appeals' dictum: petitioner's analysis is simply incorrect.

a. The court of appeals affirmed the district court by holding the challenged statements were constitutionally protected opinion. (Pet. App. at 14b). The court of appeals stated that its discussion of the actual malice issue was not necessary to its holding. (Pet. App. at 14b). This discussion, therefore, is dictum. In fact, to reach its discussion of actual malice, the court of appeals also stated that it assumed arguendo that Col. Secrist's interpretation of the press release was accurate—that the press release unambiguously accused him of directly asking people for money in violation of the Hatch Act (Pet. App. at 12b, 13b)—when in fact the court had just rejected Col. Secrist's allegation explicitly. (Pet. App. at 13b-14b).[8]

b. In any event, the court of appeals correctly concluded that Col. Secrist had not met his burden of producing clear and convincing evidence of actual malice. (Pet. App. at 14b). As the court recognized, and as respondent Harkin stated in the press release, Col. Secrist was "raising money" for the incumbent Senator Jepsen in "numerous ways." (Pet. App. at 12b-13b). Because the statements in dispute were not known by the respondents to be false,[9] and because there was no showing

---

[8] *See supra* note 7.

[9] As we have just shown, *see supra* note 7, the court's discussions have also inescapably demonstrated that Secrist failed to prove that the disputed statements were in fact false.

of reckless disregard of the truth, there could be no actual malice. (Pet. App. at 14b).

Moreover, the court of appeals correctly relied upon this Court's decision in *St. Amant*, 390 U.S. at 733, that the failure to investigate facts obtained from reliable sources does not constitute actual malice. Here, the court of appeals found that the opinions expressed in the press release were based upon reliable, undisputed evidence obtained from public reports of Jepsen's campaign committee and of the Department of Defense and upon a witness "whose credibility has not been questioned." [10] (Pet. App. at 17b). By urging a finding of actual malice on such facts, petitioner seeks to overturn this Court's decision in *St. Amant*.

Finally, petitioner urges an incorrect application to this case of this Court's recent decision in *Harte-Hanks Communications, Inc. v. Connaughton*, 109 S.Ct. 2678 (1989). In *Connaughton*, the Court found clear and convincing evidence of actual malice: the defendant publisher's failure to investigate the story of an *unreliable* informant evidenced bad faith. 109 S.Ct. at 2693-94, 2697, 2698.[11] Thus, the *Connaughton* decision is consistent with the Court's previous decision in *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), and the example in *St. Amant* of bad faith reliance on an unreliable source. *St. Amant*, 390 U.S. at 732. Because the sources of information in this case were indisputably reliable, the *Connaughton* analysis does not apply here. (Pet. App. at 15b, 17b).

---

[10] Petitioner's argument—that the conclusions inferred by respondents from these facts are unreasonable—(Pet. at 8-9), is unsubstantiated and completely irrelevant to an actual malice analysis.

[11] Petitioner here inexplicably claims that respondents should have gone so far as to request a governmental investigation of his activities. (Pet. at 12, ¶ 15).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

MICHAEL J. MADIGAN
W. RANDOLPH TESLIK *
JOHN M. COOK
AKIN, GUMP, STRAUSS, HAUER & FELD
Suite 400
1333 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 887-4000
Attorneys for United States Senator Tom Harkin, Pam McKinney and John Frew

* Counsel of Record

APPENDIX

HARKIN
U.S. SENATE
NEWS

3213 S.W. 9th Street Des Moines, Iowa 50315
(515) 282-5050

FOR IMMEDIATE RELEASE
Oct. 11, 1984

For more information call:
Pam McKinney 515/282-5050

THE JEPSEN COLONEL CAPER

DES MOINES—A pentagon Marine Colonel assigned to drum up defense contracts for Iowa businesses has been more successful at raising money for Sen. Roger Jepsen's reelection bid, according to U.S. Rep. Tom Harkin, a candidate for the U.S. Senate.

Lt. Col. James E. Secrist was the subject of controversy last year when the Pentagon paid his $45,000 annual salary while assigning him to work as a member of Sen. Jepsen's personal Washington staff.

According to the Navy and Sen. Jepsen's office, Secrist was assigned to Jepsen to assist business in Iowa with the Pentagon's procurement process and obtain more defense contracts for the state.

During the time Secrist has been on the Jepsen staff, however, the percentage of national defense contract dollars awarded to Iowa businesses has not increased.

In the first half of FY 1984, Iowa has only received $132 million from defense contracts, approximately one-third of the total received in 1983. (Source: Department of Defense Office of Information.)

Since its formation, the Jepsen '84 Committee has received more than $88,000 from defense contractors' contributions, including Lockheed, Boeing TRW and LTV; about 60 percent of that amount was received after Secrist joined the Jepsen staff.

Secrist's assignment to the Jepsen office staff was approved in May of 1983 after the Senator personally sought and received permission from the Secretary of the Navy.

As chairman of the Armed Services Subcommittee on Manpower and Personnel, Jepsen oversees the process which sets employee ceilings for each military branch and has jurisdiction over military pay and benefits.

Paid for by Citizens for Harkin